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Held at the Palais des Nations, Geneva, on Thursday, 11 May 2017, at 10 a.m.

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Protection of the atmosphere (*continued*)

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Jalloh
	Mr. Kolodkin
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/705)

The Chairman invited the Commission to resume its consideration of the fourth report of the Special Rapporteur on the topic of protection of the atmosphere.

Ms. Oral said that she appreciated the great effort made by the Special Rapporteur to work within the restrictions placed on the Commission's consideration of the topic while endeavouring to contribute to the progressive development of international environmental law through the formulation of guidelines. However, those restrictions might have encumbered that effort, inasmuch as the report was somewhat imbalanced in its singular focus on the concept of mutual supportiveness.

Chapter I of the report discussed fragmentation of international law, a matter of particular concern in the sphere of international environmental law, as the latter was covered by over 900 instruments and was dealt with by several institutions and international organizations. Whereas the report of the Study Group of the International Law Commission on the fragmentation of international law (A/CN.4/L.682) had identified the principles of harmonization and systematic integration as means of resolving conflicts between different branches of international law, the report under consideration gave great weight to the role of mutual supportiveness as a way to resolve such conflicts, although the normative status of that concept was unclear. While the concept was mentioned in Agenda 21, it was not among the key principles incorporated in the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development in 1992. Even though mutual supportiveness undoubtedly had a role to play, she was not convinced that it had reached a high enough level of acceptance and use to be deemed a general principle of international law. Moreover, it was unclear whether the Special Rapporteur sought to use mutual supportiveness as a rule for resolving normative conflicts or as a principle for creating an obligation to protect the atmosphere.

The origins of the concept lay in the specialized field of international trade law, where it was reflected, for example, in the preamble to the Marrakesh Agreement establishing the World Trade Organization (WTO) and in the Doha Declaration, in an attempt to link the environment and trade. In non-trade agreements, such as the Cartagena Protocol on Biosafety, mutual supportiveness was used to address potential conflict with trade agreements. The list of instruments and judicial decisions provided in the report showed that mutual supportiveness was principally a policy objective in the context of international trade and investment and not a principle of general international law or a principle with general application. One learned writer, Professor Jorge Viñuales, viewed broad statements of mutual supportiveness as suggestive of policy goals, while another, Professor Riccardo Pavoni, regarded mutual supportiveness as a vague concept. The aforementioned report of the Study Group had briefly referred to mutual supportiveness as an interpretative technique, but considered its open-endedness to be a weakness. The Special Rapporteur did not provide a clear definition of the term. Indeed, it remained unclear how it would resolve conflicts or why it would be superior to conflict clauses of the kind to be found in article 22 of the Convention on Biological Diversity.

The above-mentioned Commission study paid greater attention to the principle of systematic integration deriving from article 31 (3) (c) of the Vienna Convention on the Law of Treaties as a means of resolving problems of fragmentation. That principle had been used by a number of international courts and tribunals. However, the report did not discuss article 31 (3) (c) or the principle of systematic integration as a method for ensuring a holistic or integrative interpretation of treaties that would take account of other relevant treaties. The report also made no mention of the principle of harmonization, other than a loose reference to it in draft guideline 9, although the Study Group had viewed the principle as one of the rules, methods and techniques for dealing with collisions of norms and regimes. The problem therefore appeared to be that, rather than seeking ways to harmonize existing treaties on protection of the atmosphere with other specialized regimes, the Special Rapporteur was attempting to use mutual supportiveness as a tool to build protection of the atmosphere into those regimes.

The language of draft guideline 9 was confusing in that it referred to the "principle of interrelationship", although no explanation of that term had been given in the report. She agreed with other members that there was really no such principle. The aim of that draft guideline was also somewhat confusing because it seemed to subject protection of the atmosphere to other rules of international law, such as those on trade, whereas she would have expected it to have the reverse objective. Furthermore, the reference to "other rules of international law" called to mind the wording of article 31 (3) (c) of the Vienna Convention and the principle of systematic integration, although the latter was never expressly mentioned in the report. The last part of draft guideline 9 seemed to create a presumption in favour of protection of the atmosphere along the lines of the conflict clauses in the Convention on Biological Diversity and the Cartagena Protocol on Biosafety. Some judicial bodies had also used a principle of environmental law applied in Latin America and known as *in dubio pro natura*, which signified that, when there was a conflict between obligations or interpretations, the solution which furthered protection of the environment should prevail. The Special Rapporteur could perhaps have examined that principle as a possible route to resolving conflicts.

Turning to chapter II on interrelationship with international trade and investment law, she said that trade law was a classic area where significant normative conflict with environmental treaties and norms could arise. Trade agreements and investment agreements, whether multilateral, regional or bilateral, could have a regulatory chilling effect on environmental protection, notwithstanding the incorporation of references to the latter or of mutual supportiveness clauses in some WTO instruments, or in other instruments such as the North American Free Trade Agreement (NAFTA). A number of the cases cited by the Special Rapporteur had demonstrated that conflict and the risk that trade norms such as non-discrimination, most-favoured nation clauses and rules against subsidies could operate against national measures seeking to protect the environment. The *Shrimp-Turtle* case and the *Tuna-Dolphin* dispute were instances where environmental interests had been subordinated to trade rules. She concurred with Mr. Tladi that the case law of WTO bodies had had a negative effect in respect of environmental concerns. The Commission should therefore be careful about incorporating trade law concepts into draft guidelines aimed at protecting the atmosphere.

Draft guideline 10 seemed to be imposing a specific obligation on States to protect the atmosphere in trade and investment law. While she agreed with the sentiment, she anticipated that its wording was likely to raise concerns among some States. Its language could be simplified by simply stating:

> "Where applicable, in order to further sustainable development, in the fields of international trade law and international investment law, States should exercise their rights and obligations in a mutually supportive manner with other rules of international law relating to the protection of the atmosphere."

In connection with chapter III of the report on interrelationship with the law of the sea, she wished to thank the Special Rapporteur for organizing a meeting with a panel of experts, who had highlighted the linkage between the atmosphere and the ocean. Although the United Nations Convention on the Law of the Sea was considered to be the constitution of the oceans and provided the most comprehensive global framework for the protection and preservation of the marine environment, it did not cover climate change, which had not become an item on the international agenda until a decade after the adoption of the Convention in 1982. The question of climate change and its impact on the marine environment through ocean acidification and the issue of State obligations in relation to climate change, which could be inferred from Part XII of the Convention, required much more detailed analysis and in-depth treatment than they had been given in the report.

The statement in paragraph 51 of the report that greenhouse gas emissions from ships was a main factor contributing to climate change was inaccurate, since they accounted for only 10 per cent of the pollution of the marine environment in general and, according to an International Maritime Organization (IMO) study, no more than 2.2 per cent of total global emissions for 2014.

Paragraph 53 of the report was also confusing because, in an effort to encompass greenhouse gas emissions from land-based sources, that paragraph apparently tried to establish a link between shipping and IMO to land-based sources of marine pollution. However, to the best of her knowledge, IMO was not regarded as a competent organization for dealing with pollution from those sources, since it had a mandate to deal with shipping and pollution from vessel-based sources — the subject matter of article 211 of the United Nations Convention on the Law of the Sea. For example, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter regulated incineration of waste at sea by ships. She was therefore unsure what treaties had been incorporated into the United Nations Convention on the Law of the Sea "by reference". The link made in the same paragraph between the principle of common but differentiated responsibilities and States' obligations under article 194 (1) of the aforementioned Convention was highly controversial, because in the climate change regime the application of that principle was closely associated with the issue of developed States' historical responsibility for greenhouse gas emissions leading to anthropogenic climate change. At all events, it was unclear why the rationale for common but differentiated responsibilities and national circumstances should apply to shipping and, in any case, it was a matter that fell outside the scope of the topic.

In paragraphs 50, 54 and 62 of his report, the Special Rapporteur linked mutual supportiveness to States' obligations under the United Nations Convention on the Law of the Sea and IMO instruments in relation to climate change and offered it as a solution to the extremely complex interrelationship between the Convention, IMO, the climate change regime and the application of common but differentiated responsibilities and national circumstances. That seemed too facile a solution to such complex questions of law. She therefore doubted that the concept of mutual supportiveness applied in respect of the United Nations Convention on the Law of the Sea and the protection of the atmosphere.

Moreover, it was stretching the interpretation of the decision of the International Tribunal for the Law of the Sea in the *MOX Plant Case* (*Ireland v. United Kingdom*) to regard it as an example of the application of mutual supportiveness in the context of the law of the sea, since the case was concerned with marine pollution and was of no relevance to protection of the atmosphere. The Tribunal had denied the provisional order requested by Ireland on grounds of lack of urgency; its decision did not concern sustainable development or mutual supportiveness, as the report indicated.

The report also addressed the very serious challenge of the repercussions of rising sea levels resulting from climate change. While that was an extremely important matter raising many serious legal issues extending across several areas of law, she was unsure that it was appropriate to address such a complex question in one broad guideline.

She fully concurred with Mr. Tladi's comment that draft guideline 11 diluted what was a clear obligation under the article 194 of the United Nations Convention on the Law of the Sea to take all measures consistent with that Convention that were necessary to prevent, reduce and control pollution of the marine environment from any source. Likewise, the draft guideline, couched in hortatory language, would imply a lower standard of action than the mandatory language of article 212 of the Convention, which required States to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere. She reiterated her concern about applying the concept of mutual supportiveness in the context of the Convention, where there were very clear obligations.

Paragraph 2 of draft guideline 11, which called on States and competent international organizations to take into account the situation of small island States and low-lying States with regard to the baselines for the delimitation of their maritime zones under the law of the sea, dealt with a question of delimitation, not protection of the atmosphere. It should therefore not be included in the draft guideline. The question addressed in that paragraph was indeed a serious matter, and she agreed with Mr. Nguyen that it could be considered for inclusion as a separate topic in the long-term programme of work of the Commission. The Commission should therefore be careful not to prejudice any future work it might undertake on the matter by endorsing a vague hortatory guideline of questionable application.

Turning to chapter !V, she said that it was fair to say that there was now a firmly established relationship between protection of fundamental human rights and protection of the environment under international law. Indeed, the United Nations had appointed Special Rapporteurs on human rights and the environment, whose reports might be usefully consulted by the Special Rapporteur and the Commission.

On the question of extraterritoriality, she noted that there was currently a request for an advisory opinion before the Inter-American Court of Human Rights that included the question of whether an exception to the principle of the territoriality of "jurisdiction" pursuant to the Pact of San José existed under multilateral environmental agreements or under regional treaties for the protection of oceans and seas. It might also be useful to follow developments in those proceedings.

She agreed in principle with the Special Rapporteur's objective to create an express linkage between protection of the atmosphere and human rights. However, her concern was that the reliance on the hortatory principle of mutual supportiveness where there was existing law and practice would operate regressively, instead of progressively developing international environmental law, international law and human rights law.

After listening to colleagues at the previous meeting, she tended to agree with the views of those who had questioned the need for so many guidelines and who had suggested that they should be merged into one. Accordingly, if the Commission was in agreement, she would support the referral of draft guidelines 9 to 12 to the Drafting Committee with a view to their merger into a single guideline.

Mr. !Hmoud said that he would first like to thank the Special Rapporteur for his comprehensive and well-researched fourth report, which reflected his dedication to the topic and his efforts to achieve a successful outcome.

Like other colleagues who had spoken before him, he was still grappling to understand the purported goal of the report and the draft guidelines contained therein on the interrelationship between international law on the protection of the atmosphere and other fields of international law. The role of the draft guidelines being developed by the Commission was to provide guidance to States and other actors on their obligations under international law in relation to protection from atmospheric pollution and atmospheric degradation. Thus far, the Commission had been able to agree on a set of draft guidelines that sought to identify the main characteristics of the legal system of atmospheric protection. Such a system did not, however, exist in isolation in international law; he, like others before him, was therefore not comfortable with it being described in paragraph 8 as an autonomous regime. Although in that paragraph the Special Rapporteur went on to state that the law of the atmosphere was in no way a self-contained or sealed regime, the distinction was not clear. Self-contained regimes, such as diplomatic law, were the exception in international law, encompassing both primary rules on rights and responsibilities and secondary rules on administration and compliance. Their treatment and interrelationship with regimes and rules of international law were complex, as the Commission's study on the fragmentation of international law had demonstrated. Nonetheless, according to the proposed workplan, the next report would tackle compliance and dispute settlement, which would suggest that the topic was more about a self-contained legal regime. Like Mr. Tladi, he considered that there was a need for caution in that regard.

Presumably, it was on that premise that the Special Rapporteur had introduced the issue of the interrelationship of the law on the protection of the atmosphere with other fields of international law. Even self-contained or autonomous regimes needed to interact with other fields of law in certain circumstances, and their principles could not exist in isolation. The question that arose was whether such an interrelationship could be regulated through a set of guidelines, as proposed in the fourth report. It was hard to understand how the guidelines on interrelationship would serve both treaty-based protection rules and those principles contained in the draft guidelines. What were the rules of interpretation that would be applied? Article 31 of the Vienna Convention on the Law of Treaties was about treaty interpretation, so it would apply insofar as treaty rules were concerned. Other customary rules might assist in that regard, but then it would be necessary to clarify whether principles

of different fields of law or the interrelationship between different legal regimes were at issue.

On another point, the draft guidelines proposed in the fourth report sometimes treated the law on the protection of the atmosphere as *generalis* with respect to certain fields and at other times as *specialis* in relation to other fields. The report provided some sources for jurisprudence, case law and treaty law to underpin certain propositions for the specific relationships, but they were in no way conclusive.

In paragraph 7, the report stated that there was an intrinsic link between the law relating to the protection of the atmosphere and international human rights law, the law of the sea and international trade and investment law. However, as other colleagues had asserted the previous day, such an intrinsic relationship was not clear and might not warrant draft guidelines dealing specifically with potential interrelationship issues. Furthermore, the report did not discuss the interrelationship with international environmental law, a field of international law that was crucial to the law on the protection of the atmosphere. Were the rules on atmospheric protection part of international environmental law? Were they special rules *vis-à-vis* the general rules of environmental protection or did they exist separately? It was noteworthy that the sources provided in the report regarding questions of interrelationship mainly involved cases and treaties on environmental law; it would have been more pertinent therefore to discuss the relationship of the law on the protection of the atmosphere with international environmental law before dwelling on issues relating to certain other fields of international law.

Turning to specific points raised in the report, he said that he agreed with the Special Rapporteur's assertion in paragraph 9 that the law on the protection of the atmosphere was part of general international law and that the legal principles and rules applicable to the atmosphere should, as far as possible, be considered in relation to the doctrine and jurisprudence of general international law. The Special Rapporteur then endorsed a generalist or integrative approach, which cut across the boundaries of special regimes. However, throughout the report there seemed to be no synergy between the treatment of special regimes and rules on atmospheric protection; nor were any explanations provided concerning potential conflict between such rules and the special regimes or as to why the interpretation of certain atmospheric rules in the light of special regimes should warrant dedicated guidelines.

In any case, the Commission should avoid rewriting the rules of the Vienna Convention on interpretation and the conclusions of the study on the fragmentation of international law; nor should it choose which rules and conclusions to apply on interrelationship and then add new elements for determining interrelationship. Rules on hierarchy, conflict and interpretation should all be taken into account, together with the principle of harmonization.

An additional element that the Special Rapporteur introduced to apply to interrelationship was the concept of mutual supportiveness. That concept was applied throughout the report to assist in determining interrelationship and dealing with possible conflicts and the interpretation of rules. The report referred to Agenda 21, which placed emphasis on making trade and environment mutually supportive, and stated that the concept of mutual supportiveness pursued a balance between the different branches of international law in light of the concept of sustainable development. It was clear from such a statement that mutual supportiveness was, as Sir Michael Wood had mentioned the previous day, a policy consideration, or, as Mr. Tladi had said, an objective; it could not, however, be a legal principle with "normative dimensions", as stated in paragraph 15 of the report. He did not agree with the statement in paragraph 14 that mutual supportiveness could be regarded as "as an indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition". No evidence was presented for the proposition that mutual supportiveness was a principle of international law, and an article in the *European Journal of International Law*, cited in the report, was not sufficient to declare it as such. The report further stated, in paragraph 15, that mutual supportiveness required States to negotiate in good faith with a view to preventing *ex ante* possible conflicts and to interpret, apply and implement relevant rules in a harmonious manner in order to resolve *ex post* actual conflicts to the extent possible. The so-called normative content of mutual

supportiveness was not supported by evidence or practice. While States ought to negotiate in good faith and seek to implement relevant rules in a harmonious manner, the whole content of the proposition lacked any legal basis. The same could be said about the idea that there existed a "close alliance" between the concepts of sustainable development and mutual supportiveness. A policy connection might exist, but there was no normative relationship on which to build. The report acknowledged that the relevant article of the Vienna Convention should be applicable in order to resolve matters of interpretation and conflict but stated that the traditional methods of treaty interpretation themselves might not lead to the desired mutual supportiveness. Again, the policy purpose of mutual supportiveness should not trump rules of international law, including the Vienna Convention rules, or seek to amend them. However, draft guideline 9 seemed to do just that: although drafted in non-binding form, the guideline was normative in content. While mutual supportiveness could be provided for in the draft guideline as a goal or simply as guidance, the guideline should stress that matters of interpretation and conflict ought to be determined by the relevant rules of the Vienna Convention and customary international law. He would opt for using the term "harmonious manner" rather than "mutually supportive", as the former was an established concept in that regard. Draft guideline 9 also provided that States should "develop" the rules on atmospheric protection in a mutually supportive and harmonious manner with other rules of international law. That was simply unimplementable and lacked sound basis in either theory or practice. Furthermore, the draft guideline provided that, when resolving conflict, priority should be given to protecting the atmosphere from atmospheric pollution and atmospheric degradation. That ran counter not only to the logic for mutual supportiveness as advanced in the report, but it was also a sweeping policy statement that ran contrary to international law. What if, for example, the conflict was with *jus cogens* rules of another field of international law and the application of the *jus cogens* rules would lead to the atmospheric protection being undermined in a particular situation?

On interrelationship with international trade law, the report referred to article XX of the General Agreement on Tariffs and Trade (GATT) and provided relevant case law to support the proposition of mutual supportiveness, such as the *Shrimp-Turtle* case before the WTO Appellate Body. However, in his view, the relationship between article XX and the concept of mutual supportiveness had not at all been substantiated. The article allowed Contracting Parties to adopt national measures to, *inter alia*, protect human health and conserve natural resources as long as they were not arbitrary or discriminatory, or a disguised restriction on international trade. If anything, article XX provided for the prioritization of certain higher policy trade goals, while at the same time providing for the right of the State to take national protection measures. It was not about mutual supportiveness. On the other hand, WTO case law had dealt with the issue of interrelationship with international environmental law principles in the *Beef Hormones* case, in which the Appellate Body had determined that the "precautionary principle", to the extent that it could be considered to exist under international environmental law, was not binding in the context of WTO. How could that proposition be reconciled with mutual supportiveness? If anything, the ruling denoted that trade and environmental regimes might not always apply in an integrated manner. The issue in the *Gasoline* case, referred to in paragraph 28 of the report, was treaty interpretation and whether or not Vienna Convention rules and customary international law rules on interpretation applied when interpreting WTO law. It was not an example of mutual supportiveness between trade law and environmental law.

On investment law, what was said about article XX of GATT could be said about article 1114 of NAFTA, which allowed the adoption of appropriate national environmental measures and recognized the inappropriateness of relaxing environmental measures for purposes of investment protection. The same could be said about the right to take national environmental measures under the Comprehensive Economic and Trade Agreement (CETA) as long as the measures served a legitimate policy objective. Again, the two examples were not about mutual supportiveness in the field of international law but about resolving conflict between national legal measures and potential treaty obligations. Indeed, the case law under NAFTA pointed in that direction, including the *Myers* case, which involved national environmental measures. The reference in that case to mutual supportiveness was a

policy statement, not a legal norm. Bilateral investment treaties were not consistent in their treatment of environmental standards and, when they provided for measures in that connection, it was more in the context of the right to enforce national environmental standards. As such, he was of the view that draft guideline 10 should be substantially reformulated or deleted.

On interrelationship with the law of the sea, it should be noted that the United Nations Convention on the Law of the Sea, although dealing with marine pollution from land-based and airborne sources, did not address atmospheric pollution as such. Indeed, in paragraphs 57 and 62, the report acknowledged the limited interrelationship between the law of the sea and the protection of the atmosphere. In addition, while the relevant IMO instruments and standards dealt with land-based pollution and pollution from vessels, they were not examples of mutual supportiveness; rather, they related to the adoption of certain environmental measures at the national level, as well as on national vessels.

The issue of sea-level rise and its effects on small island States was a matter of serious concern, which, as the Special Rapporteur indicated, required a *lex ferenda* approach. However, as other colleagues had mentioned, it was not only a matter of baselines: issues such as sovereignty and territory were involved, which needed a holistic approach and in-depth engagement by the international community. He was not sure that anything was added by the statement in draft guideline 11 (2) about the need to consider the situations of small island States and low-lying States with regard to the baselines for maritime delimitation.

He did not support the proposition set out in draft guideline 11 (1). If measures were already being taken in the context of marine pollution to deal with atmospheric pollution and degradation, it was not clear what would be added by that paragraph. Furthermore, it was not clear what was meant by appropriate measures in the field of the law of the sea. Were such measures national or international? Did they impose an obligation on international bodies such as IMO?

Lastly, on interrelationship with international human rights law, he understood that there existed distinct human rights protections that in certain circumstances might be affected by air pollution or atmospheric degradation. However, as the report indicated, there had to be a link — a direct link — between atmospheric damage, the harm caused and the breach of relevant human rights. Different treaties varied in the emphasis placed on the different parts of that trilateral relationship, and it was doubtful that one standard could be set in that regard; in fact, to do so might restrict the ability of judicial and treaty bodies, as well as States, to interpret and apply the treaty concerned. One size did not fit all, as the examples in the report demonstrated. He did not view the creation of a human right on atmospheric protection as a purpose of the exercise. Draft guideline 12 (1) prioritized effective protection of the atmosphere in the interrelationship between human rights law and the law of the atmosphere. However, nothing in the report pointed to case law or State practice that supported that proposition. Regarding draft guideline 12 (2), while he was in favour of a formulation that placed emphasis on the situation of particularly vulnerable groups, the question was how to achieve that objective and whether the draft guidelines were the best place to tackle it. The same applied to the situation of the population of small island States and low-lying States.

In conclusion, like Mr. Park and Mr. Nguyen, he was in favour of a single draft guideline on interrelationship with the rules and principles of other fields of international law. Such a draft guideline would stipulate adherence to the rules of the Vienna Convention and customary international law with regard to interpretation and resolution of conflict between rules on atmospheric protection and other rules of international law.

Mr. Cissé said that he wished to commend the Special Rapporteur on his well-researched fourth report on a complex topic. He noted that the title of the report, protection of the atmosphere, did not reflect its content, inasmuch as the topic had been addressed largely in terms of its relationship with other areas of international law. It would have been more straightforward to address the topic only in terms of its relationship with the law of the sea. In his view, trade law, human rights law and investment law should not be

considered in the report, as they were only very distantly related to protection of the atmosphere.

The Special Rapporteur had concluded, in paragraph 62 of the report, that "the interrelationship between the sea and the atmosphere covered by the United Nations Convention on the Law of the Sea is limited and unilateral (one way from the atmosphere to the oceans, but not the other way around)". However, in his view, that wording did not reflect the facts or the law, since influence was also exerted in the other direction, from the oceans to the atmosphere, as pollution from land-based sources could enter the atmosphere via the oceans.

While he welcomed the Special Rapporteur's efforts to describe and analyse pollution from land-based sources, he observed that the report made no mention of a significant source of marine and atmospheric pollution, namely pollution from offshore oil and gas extraction platforms located on the continental shelf and in the exclusive economic zone of coastal States. Pollution from such offshore platforms warranted consideration under the topic: first, because article 194 (3) of the United Nations Convention on the Law of the Sea recognized the need to deal with all sources of pollution of the marine environment and, secondly, because it had been specifically addressed in the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention), whose annex III covered the prevention and elimination of pollution from offshore sources, and in the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention), to which an additional protocol on environmental standards for offshore oil and gas activities had recently been adopted. The Commission could enrich its work by considering how and to what extent such offshore activities were regulated in the interests of protecting the atmosphere, both in regional practice and in law.

Regarding land-based sources of pollution, he wished to point out that, in the list of international instruments dealing with that subject contained in paragraph 58 of the report, no mention was made of two relevant African legal instruments, namely the Abidjan Convention and the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention).

Sea-level rise as a result of global warming was a matter of urgent concern. Among other effects, it caused coastal erosion and changes of baselines used to determine maritime boundaries between coastal States. However, in that connection, he agreed with the Special Rapporteur that boundary treaties could not be called into question, even in the event of a fundamental change of circumstances, such as sea-level rise.

Although only small island States and low-lying States were mentioned in draft guideline 11, the situations of all coastal States should be considered in the context of the use of baselines for the delimitation of maritime zones. For small island States and low-lying States, what was most urgent was to ensure their very existence.

Mr. Šturma said that, while he had supported the inclusion of the topic in the Commission's programme of work, he had some concerns regarding the Special Rapporteur's report and plan for future work and, like some other members, was not entirely convinced that the proposed draft guidelines contributed much to the development of rules on protection of the atmosphere.

He fully recognized that, as international law was a single legal system, the rules and principles of one of its branches could not be applied in complete isolation from those of others and of general international law. In that regard, the work of the Study Group on fragmentation of international law was of great importance and surely also relevant to protection of the atmosphere as a sub-area of international environmental law. He had been surprised by the use of the expression "international law on the protection of the atmosphere", since, in his view, it was more an emerging corpus of principles and rules than a branch of international law in the manner of, for example, the law of the sea or international trade law. Care should be taken not to contribute to the fragmentation of international law by creating so-called new branches.

While the concept of mutual supportiveness might be useful as a tool for interpretation and resolution of conflicts of norms, it could hardly be described as a legal principle in the usual sense of the term. It had first appeared in Agenda 21 and had been reflected in some WTO documents and case law, but it was not necessarily used in other areas of international law. The application of the principle of systemic integration expressed in article 31 (3) (c) of the Vienna Convention on the Law of Treaties and of other rules on conflict resolution highlighted in the work of the Study Group on fragmentation of international law might serve the same or equivalent function. In the same vein, international and regional human rights bodies relied on the principle of proportionality, which was not unknown even in the field of investment law and arbitration.

The usefulness of the concept of mutual supportiveness depended largely on the nature of the rules involved. In his view, neither interrelationship nor mutual supportiveness had yet become principles of international law.

Turning to the draft guidelines themselves, he said that he did not see the added value of draft guideline 9 in relation to articles 30 and 31 of the Vienna Convention on the Law of Treaties or to the conclusions of the work of the Study Group on fragmentation of international law. If such a draft guideline were needed at all, it should refer instead to well-established rules of treaty interpretation and application that could be used in the resolution of conflict of norms.

He supported the inclusion of draft guideline 10, at least as far as the first sentence was concerned. In that sentence, the words "States should" might be replaced with "States may" in order to reflect language used in WTO agreements and case law and international investment law. However, the second sentence seemed to repeat the content of draft guideline 9 and was therefore redundant. If something more was to be said in the context of trade and investment law, mention could be made of the principles of good faith and proportionality.

Regarding draft guideline 11 (1), more consideration should be given to which provisions of the United Nations Convention on the Law of the Sea were relevant and the extent to which they related to the protection of the atmosphere. As in the previous draft guideline, the second sentence was redundant. Like many other members, he considered that draft guideline 11 (2) was clearly outside the scope of the topic; while he recognized the major challenges faced by small island States and low-lying States, the draft guidelines should be within the Commission's mandate and coherent with international law.

Draft guideline 12 (1) was partly misleading and partly redundant. The case law of the European Court of Human Rights and of other international human rights bodies generally concerned the direct or indirect protection of the individual rights of persons living in areas directly affected by environmental pollution, which was related only loosely, if at all, to the protection of the atmosphere.

The collective rights of vulnerable groups of people, the inhabitants of small island States and ecological migrants seemed to be a different case. Although international law was not yet sufficiently developed in those areas, draft guideline 12 (2) and (3) seemed to be useful in terms of policy objectives and the progressive development of international law.

Draft guideline 12 (4) was redundant, as the interests of future generations were already reflected in draft guideline 6, and it could therefore be deleted.

He would not oppose the referral of the draft guidelines to the Drafting Committee if that was the wish of the majority of Commission.

The meeting rose at 11.20 a.m. to enable the Drafting Committee on Crimes against humanity to meet.